given an opportunity to submit information and views on the regulation at an open meeting, and handlers were apprised of its provisions and effective time. It is necessary, therefore, in order to effectuate the declared purposes of the Act, to make this regulatory provision effective as specified.

List of Subjects in 7 CFR Part 907

Arizona, California, Marketing agreements and orders, Navel, Oranges.

For the reasons set forth in the preamble, 7 CFR part 907 is amended as follows:

1. The authority citation for 7 CFR part 907 continues to read as follows:

Authority: Secs. 1.19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 907.1000 is added to read as follows:

Note: This section will not appear in the annual Code of Federal Regulations.

§ 907.1000 Navel Orange Regulation 700.

The quantity of navel oranges grown in California and Arizona which may be handled during the period from December 29, 1989, through January 4, 1990, is established as follows:

(a) District 1: 1,282,000 cartons;
(b) District 2: unlimited cartons;
(c) District 3: 68,000 cartons;
(d) District 4: unlimited cartons.

Dated: December 28, 1989.

Charles R. Brader,

Director, Fruit and Vegetable Division.

[FR Doc. 89–30391 Filed 12–29–89; 8:45 am]

BILLING CODE 3410–02–M

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7 CFR Part 910

[Lemon Regulation 698]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 698 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 291,766 cartons during the period from December 31, 1989, through January 6, 1990. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATES: Regulation 698 (7 CFR Part 910) is effective for the period from December 31, 1989, through January 6, 1990.

FOR FURTHER INFORMATION CONTACT: Beatriz Rodriguez, Marketing Specialist, Marketing Order Administration Branch, F&V, AMS, USDA, room 2523, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 475–3861.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed under Executive Order 12291 and Departmental Regulation 1512–1 and has been determined to be a "non-major" rule under criteria contained therein.

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Administrator of the Agricultural Marketing Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

The purpose of the RFA is to fit regulatory action to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Agricultural Marketing Agreement Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf. Thus, both statutes have small entity orientation and compatibility.

There are approximately 85 handlers of lemons grown in California and Arizona subject to regulation under the lemon marketing order and approximately 2,500 producers in the regulated area. Small agricultural producers have been defined by the Small Business Administration (13 CFR 121.2) as those having annual receipts of less than $500,000, and small agricultural service firms are defined as those whose annual receipts are less than $3,500,000. The majority of handlers and producers of California-Arizona lemons may be classified as small entities.

This regulation is issued under Marketing Order No. 910, as amended (7 CFR part 910), regulating the handling of lemons grown in California and Arizona. The order is effective under the Agricultural Marketing Agreement Act (the "Act," 7 U.S.C. 601–674), as amended. This action is based upon the recommendation and information submitted by the Lemon Administrative Committees (Committee) and upon other available information. It is found that this action will tend to effectuate the declared policy of the Act.

This regulation is consistent with the California-Arizona lemon marketing policy for 1989–90. The Committee met publicly on December 27, 1989, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and unanimously recommended a quantity of lemons deemed advisable to be handled during the specified week. The Committee reports that overall demand for lemons is moderate.

Pursuant to 5 U.S.C. 553, it is further found that it is impracticable, unnecessary, and contrary to the public interest to give preliminary notice and engage in further public procedure with respect to this action and that good cause exists for not postponing the effective date of this action until 30 days after publication in the Federal Register because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the Act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary, in order to effectuate the declared purposes of the Act, to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Arizona, California, Lemons, Marketing agreements and orders.

For the reasons set forth in the preamble, 7 CFR part 910 is amended as follows:

PART 910—LEMONS GROWN IN CALIFORNIA AND ARIZONA

1. The authority citation for 7 CFR part 910 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 910.998 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 910.998 Lemon Regulation 698.

The quantity of lemons grown in California and Arizona which may be handled during the period from December 31, 1989, through January 6, 1990, is established at 291,766 cartons.

Dated: December 28, 1989.

Charles R. Brader,

Director, Fruit and Vegetable Division.

[FR Doc. 89–30390 Filed 12–29–89; 8:45 am]

BILLING CODE 3410–02–M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 10

RIN 3150-AD42

Suspension of Access Authorization and/or Employment Clearance; Delegation of Authority to Deputy Executive Directors

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is amending its regulations to permit a Deputy Executive Director to suspend an individual's access authorization and/or employment clearance. This amendment will provide greater flexibility in responding to questions concerning the continued eligibility of an individual's access authorization and/or employment clearance.

EFFECTIVE DATE: January 2, 1990.

FOR FURTHER INFORMATION CONTACT: Royal J. Voegele, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone (301) 492-1562.

SUPPLEMENTARY INFORMATION: On January 9, 1989, the Nuclear Regulatory Commission (NRC) announced organizational changes within the Office of the Executive Director for Operations. In the reorganization, the Commission appointed a second Deputy Executive Director and assigned specific areas of responsibility to the two deputies. Both Deputy Executive Directors report to the Executive Director for Operations. The NRC is amending portions of its regulations to specify that in lieu of the Executive Director for Operations, a Deputy Executive Director is authorized to suspend an individual's access authorization and/or employment clearance.

Because these are amendments dealing with agency practice and procedures, the notice and comment provisions of the Administrative Procedure Act do not apply pursuant to 5 U.S.C. 553(b)(A). The amendments are effective upon publication in the **Federal Register**. Good cause exists to dispense with the usual 30-day delay in the effective date, because these amendments are of a minor and administrative nature, dealing with agency organization.

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in 10 CFR 51.22(c)(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and therefore is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

List of Subjects in 10 CFR Part 10

Administrative practice and procedure, Classified information, Government employees, Security measures.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is adopting the following amendments to 10 CFR part 10.

PART 10—CRITERIA AND PROCEDURES FOR DETERMINING ELIGIBILITY FOR ACCESS TO RESTRICTED DATA OR NATIONAL SECURITY INFORMATION OR AN EMPLOYMENT CLEARANCE

1. The authority citation for part 10 continues to read as follows:

Authority: Secs. 145, 161, 68 Stat. 942, 948, as amended (42 U.S.C. 2165, 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); E.O. 10450, 3 CFR 1949-1953 COMP., p. 936, as amended; E.O. 10865, 3 CFR 1959-1963 COMP., p. 398, as amended; 3 CFR Table 4.

2. Section 10.21 is revised to read as follows:

§ 10.21 Suspension of access authorization and/or employment clearance.

In those cases where information is received which raises a question concerning the continued eligibility of an individual for access authorization and/or employment clearance, the Director, Division of Security, through the Director, Office of Administration, shall forward to the Executive Director for Operations or a Deputy Executive Director, his or her recommendation as to whether the individual's access authorization and/or employment clearance should be suspended pending the final determination resulting from the operation of the procedures provided in this part. In making this recommendation the Director, Division of Security, shall consider such factors as the seriousness of the derogatory information developed, the degree of access of the individual to classified information, and the individual's opportunity by reason of his or her position to commit acts adversely affecting the national security. An individual's access authorization and/or employment clearance may not be suspended except by the direction of the Executive Director for Operations or a Deputy Executive Director.

Dated at Rockville, Maryland, this 19th day of December 1989.

For the Nuclear Regulatory Commission.

James M. Taylor,

Executive Director for Operations.

[FR Doc. 89-30343 Filed 12-29-89; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 16

[Docket No. RM87-33-001; Order No. 513-A]

Hydroelectric Relicensing Regulations Under the Federal Power Act; Order on Rehearing

Issued December 26, 1989.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule; Order on rehearing.

SUMMARY The Federal Energy Regulatory Commission (Commission) issued a final rule in Order No. 513 (54 FR 23756 (June 2, 1989) III FERC Stats. & Regs ¶ 30,854) on May 17, 1989, revising its regulations governing the relicensing of hydroelectric power projects.

This order grants in part and denies in part rehearing of Order No. 513. This order also amends the regulatory text dealing with the pre-filing consultation process by adding the phrase "Indian tribes" to numerous consultation provisions. Also included in this order is a clarification of § 16.2(c)(2) that applies to requested studies made in the second stage of consultation, and the addition of a new paragraph (d) in § 16.18, which modifies interim environmental conditions in annual licenses.

EFFECTIVE DATE: This order on rehearing is effective December 26, 1989.

FOR FURTHER INFORMATION CONTACT: Ethel Lenardson Morgan, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357-8530.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or

copy the contents of this document during normal business hours in Room 1000 at the Commission's Headquarters, 825 North Capitol Street NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing (202) 357–8997. To access CIPS, set your communications software to use 300, 1200 or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this order on rehearing will be available on CIPS for 30 days from the date of issuance. The complete text on the diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in Room 1000, 825 North Capitol Street NE., Washington, DC 20426.

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

The Federal Energy Regulatory Commission (Commission) is granting in part and denying in part rehearing of Order No. 513.

The Commission issued a final rule in ths docket on May 17, 1989.[1] The final rule revised the regulations governing the relicensing of hydroelectric power projects. These revisions implemented, in part, provisions added to the Federal Power Act (FPA) [2] by the Electric Consumers Protection Act of 1986 (ECPA).[3]

The Commission received twelve rehearing requests.[4] These included a number of requests to stay all or portions of the final rule or to waive particular provisions of the rule for individual projects.[5]

Many of the arguments made on rehearing are the same or similar to those raised in comments on the Notice of Proposed Rulemaking (NOPR).[6] The Commission believes that, with minor exceptions discussed in detail below, the final rule established standards that are well balanced and will facilitate the relicensing process for all involved. To the extent that the arguments presented on rehearing were addressed by the Commission in the final rule and do not raise any new issues of fact, law, or policy, they will not be addressed herein; the Commission incorporates by reference its discussion of these issues in the preamble to the final rule. Several arguments merit additional discussion, and the Commission will explain certain provisions of the regulations and modify others.

A. Acceleration of License Expiration Dates

The final rule provided for the acceleration of license expiration dates for any legitimate interest including, but not limited to, installation of new capacity.[7] Trout Unlimited requests reconsideration on this point, suggesting that acceleration should be discouraged at this time because of the extremely heavy volume of upcoming relicensing proceedings. The Commission declines to make any further revisions in § 16.4 because the final rule provides adequate flexibility in setting license expiration dates.

In response to this same comment made by Trout Unlimited on the NOPR, the Commission stated that it would "be able to weigh the potential burdens on Commission resources when it was considering whether to grant the acceleration request." [8] Trout Unlimited now explains that its main concern was "the burden on resources of other entities involved in the relicensing process, including state agencies, Federal agencies, and public interest groups." It suggests that since the Commission stated that requests for acceleration will be granted "only if it is in the public interest to do so," the Commission must weigh the potential burdens on all parties when considering an acceleration request.

The Commission has stated that it does not anticipate that many licensees will attempt to avail themselves of the acceleration procedure. Also, §§ 16.4(a)(2) and 16.4(c) were revised to give the Commission flexibility in setting time limits in the acceleration process.[9] This flexibility can be used to alleviate time constraints on all of the parties.

B. New Capacity Amendments

Long Lake is concerned that the Commission has decided in § 16.4 that if an existing licensee is interested in developing unutilized capacity at or in the vicinity of its existing project and the license for that project is nearing expiration, the incremental development will be considered only in a relicensing proceeding. It contends that this position is inconsistent with the court's decision in *Kamargo Corp.* v. *FERC.*[10]

Kamargo holds that ECPA does not preclude the Commission from granting a preliminary permit for development of excess hydroelectric capacity at or near an existing project at a time when the project's license is about to expire. In that case, applicants sought a number of preliminary permits to study the feasibility of developing currently unlicensed generating capacity at or near projects owned and licensed by another entity. The Commission refused to grant the permits, *intra alia*, on the ground that ECPA precluded such a grant at a time close to relicensing of the existing projects. The court reversed and remanded the case to the Commission, where it is currently pending.

Lone Lake's concern arises from the following:

(1) The Commission's statement explaining the provision of § 16.4 relating to acceleration requests: "Licensees always have the ability to file applications to amend their licenses to increase the capacity of their projects, and do not have to request acceleration of their licenses to do so."

(2) The footnote to the above statement:

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[1] 54 FR 23757 (June 2, 1989), III FERC Stats. & Regs. 30,854.

[2] 16 U.S.C. 791 a–825 r (1989).

[3] Pub. L. No. 99–495, 100 Stat. 1243 (Oct. 16, 1986).

[4] (1) Columbia River Inter-Tribal Fish Commission and Confederated Tribes and Bands of the Yakima Indians (jointly, Columbia Commission); (2) Point No Point Treaty Council (Treaty Council); (3) U.S. Department of Commerce; (4) Washington Department of Fisheries and Washington Department of Wildlife (jointly, Washington); (5) Great Northern Nekoosa Corporation (Great Northern); (6) Niagara Mohawk Power Corporation/Fourth Branch Associates (Niagara Mohawk); (7) National Hydropower Association (National Hydropower); (8) Long Lake Energy Corporation (Long Lake); (9) Trout Unlimited; (10) Edison Electric Institute (EEI); (11) Northern California Power Agency (Northern California Agency); (12) American Rivers, National Wildlife Federation, American Whitewater Affiliation, and California Save Our Streams (jointly, American Rivers).

[5] Rehearing was granted solely for the purpose of further consideration on July 7, 1989. 44 FERC ¶ 61,289. The requests for stays and waivers have been rendered moot by this order on rehearing and are therefore denied.

[6] Hydroelectric Relicensing Regulations Under the Federal Power Act, 53 FR 21844 (June 10, 1988), IV FERC Stats. & Regs. ¶ 32,461 (May 24, 1988).

[7] *See* 18 CFR 16.4 (1988).

[8] 54 FR at 23762–63.

[9] Section 16.4(a)(2) was revised to provide that, unless the Commission specified a later period, the information is to be made available no later than 90 days from the date the Commission approves an acceleration request. Section 16.4(c) specifies that the date on which an accelerated license expires will be not be less than five years plus 90 days from the date of the Commission order approving the acceleration request. These provisions afford the Commission ample flexibility when setting expiration dates, and afford ample scope for the commission to consider the burden on resources of all participants in the relicensing process.

[10] 852 F.2d 1392 (D.C. Cir. 1988).

> The Commission may, however, decline to consider new capacity amendments which are requested by an existing licensee near the expiration date of an existing license if it appears that it would be in the public interest to consider those amendments in the context of a relicensing proceeding where competing redevelopment proposals may be considered.[11]

From these statements Long Lake assumes that the Commission is now promulgating a final rule that contravenes the Kamargo decision. This is simply not so. Here the Commission is referring to an acceleration request by a licensee, not to a preliminary permit request by a potential applicant.[12] Also, it is clear from the quoted footnote that such request may be considered in the context of a relicensing when requested by an existing licensee near the expiration date of an existing license if it appears that it would be in the public interest to do so.

Contrary to Long Lake's position, this does not suggest that "the licensing of unutilized water resources at or near an existing project will take place [only] in the context of a relicensing proceeding." Nor is it "implicit" that such a project will necessarily be treated as the subject of a new license rather than as an original license.

C. Pre-filing Consultation

1. Time Limits and Extensions

The final rule requires that the initial joint meeting be held 30 to 60 days from the date of the applicant's letter transmitting the § 16.8(b)(1) information package to the resource agencies. National Hydropower requests that the Director of the Office of Hydropower Licensing (Director) be given the authority to extend the deadline for the initial joint meeting.

For the reasons discussed in the final rule, the Commission declines to permit formal extensions of the time in which to conduct the § 16.8(b)(2) joint meeting since a clear non-extendable deadline is required in order to meet the filing deadlines mandated by ECPA.[13]

In response to many comments, the final rule extended the time limits proposed in the NOPR. The final rule also modified the dispute resolution process to provide that agencies that believe that they have not been provided with all of the § 16.8(b)(1) information by the applicant may refer this issue to the Director for resolution and, if appropriate, obtain an extension of time to file their responses under § 16.8(b)(3) until after all the information is provided.

On rehearing, some commenters argue that the final rule places unduly strict time constraints on consulting agencies while others maintain that the rule is too lenient and surrenders control of the relicensing process to these agencies.

American Rivers asserts that the time requirements placed on the agencies are much more stringent than those required of potential applicants or the Commission staff. It argues that the Commission imposes an undue burden on the agencies by requiring that they quickly study the non-detailed information package and determine and provide extensive supporting documents for the study plan required by the project.

We do not agree with American Rivers' assertion that the agencies are under time constraints more stringent than the other parties. ECPA has mandated filing deadlines for the relicensing process, and all parties to this process are required to comply with these time constraints. The final rule has provided the agencies with the maximum amount of time consistent with timely preparation of the application. The regulations allow an extension of the date on which the study requests are due when the applicant has not fully complied with § 16.8(b)(1). The Commission is required to set time limits that comply with the mandate of ECPA, and we believe that the final rule imposes balanced time constraints that are fair to all parties.

Washington alleges that the final rule contains incomplete, unfair and arbitrary timing extensions. It asserts that § 16.8(b)(4) provides the possibility of an extension of the time in which an agency must respond with written comments during the first stage consultation period but the referenced paragraph, (b)(5) of § 16.8, fails to provide any mechanism for requesting an extension of time.

The regulation is not unfair, incomplete or arbitrary. It provides that agencies that believe that they have not been provided with all of the § 16.8(b)(1) information by the applicant may refer the issue to the Director for resolution. In that circumstance, the Director can grant the agency an extension of time to file its response under § 16.8(b)(4).[14] If an agency and applicant agree that more time is needed to provide all the information required by § 16.8(b)(1), a short extension of time may be requested from the Director. When there is no agreement on the need for an extension of time to request a study, or on the need for a study, the dispute resolution process should be used.

In comments on the NOPR, Long Lake urged the Commission to specify that an agency that fails to adhere to the relicensing schedules and deadlines should "be deemed to have waived its rights to further consultation" or be allowed to rebut this waiver by showing that: (a) Particular information was required before it could complete consultation; (b) the agency asked the applicant in a timely manner to supply the information; and (c) the applicant did not do so.[15]

Long Lake repeats these recommendations in its request for rehearing and expresses dismay that the Commission not only failed to accept the recommendations but seemingly adopted regulations in the opposite direction. Long Lake believes that this will inevitably cause the Commission to surrender control of relicensing to the consulting agencies, and that the licensing process will be delayed to accommodate these agencies.

Contrary to the fears of Long Lake, a resource agency that fails to comply with a consultation provision will not be able to interfere with a potential applicant's ability to file an application on time. An agency cannot prevent an applicant from holding the initial joint meeting by refusing to attend, but that same agency would not then be prohibited from submitting written comments pursuant to § 16.8(b)(4). Studies requested after the conclusion of first-stage agency consultation are subject to the dispute resolution process. Additionally, an application will not be found deficient if those studies are not completed prior to filing an application. Final action on the merits of the application will be delayed until completion of any additional studies deemed necessary by the Director or the Commission.

As stated in the final rule, the Commission believes that exclusion of agencies from the consultation process for failure to meet consultation deadlines would be inconsistent with the Commission's obligations under the FPA and other statutes to consult with,

[11] 54 FR at 23763.

[12] Kamargo neither mandates nor precludes any particular procedure for considering development of unused water resources, and the final rule does not foreclose any of the alternatives permitted by Kamargo.

[13] 54 FR at 23770.

[14] 54 FR at 23771–72.

[15] *See* Comments of Long Lake Energy Corporation on Hydro Electric Relicensing Regulations under the Federal Power Act, September 8, 1988 at 19–20.

and consider the views and recommendations of, these agencies.[16] But, as discussed above and in the final rule, the regulations contain adequate measures to ensure that the consultation process cannot be used to delay filing of the application.

2. Notice of Meetings

The final rule provides that prior to holding a meeting with a resource agency other than the initial joint meeting, a potential applicant must provide the Commission, and each resource agency having an area of interest, expertise, or responsibility similar or related to that of the resource agency with which the potential applicant is to meet, with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at least 15 days in advance of the meeting.

National Hydropower and EEI request reconsideration of this requirement. National Hydropower asserts that the requirements of this section place an unrealistic restraint on the parties. It also suggests that communication between an applicant and an agency could be an exercise of a party's First Amendment rights to petition the government for redress of grievances. It claims that the Commission lacks authority to dictate the conditions under which either a federal or state agency can meet with an applicant or an applicant's employees or consultants. EEI argues that the regulation is indefinite since it does not set any limit as to time or subject matter, and that it fails to define "meetings."

Both stress that it is important that applicants, their employees and consultants be able to meet with resource agencies to communicate freely outside of the constraints of formal meetings. They assert that they have been involved in such meetings with respect to licensing and relicensing problems for some time, and argue that the Commission has failed either to establish that such meetings are problematic or to articulate a reason for the imposition of these restrictions.

Nothing in the final rule in any way impinges on the rights (constitutional or otherwise) and ability of any party to communicate its views to the Commission and to other governmental entities involved in the relicensing process. Such communications, however, must be conducted in an orderly process that enables the other participants in that process to perform their own responsibilities in a timely manner. We believe that we have fashioned a reasonable process whereby applicants will have ample opportunity to conduct the meaningful intensive consultation they need to prepare their applications while still affording the governmental entities in the consultative process a reasonable opportunity to derive the information they need in a timely manner that enables them to carry out their own responsibilities in that process.[17]

EEI is also concerned that the minor contacts allowed are not specified. The Commission clearly stated that the regulation in question does not apply to minor contacts between a potential applicant and a resource agency.

The Commission declines to provide either an exhaustive list or a definition of minor contacts, because it would be impractical to do so.[18] The Commission noted that the presence of Commission staff at consultation meetings should encourage accommodation of interests and generally support the consultation process. This requirement will also be of benefit to interested resource agencies, since the notice provision will give them an opportunity to attend meetings on topics relevant to their areas of expertise. The Commission declines to revise this regulation because it believes that the additional duty imposed on applicants is not unduly burdensome in relation to its benefit to the process as a whole.

3. Justification for Requested Studies

In the final rule, the Commission revised § 16.8(b)(4) to require that resource agencies justify their requests for studies and the use of study methodologies. Specifically, these provisions require that the resource agencies: identify necessary studies; explain the basis for the studies; discuss resource issues and the agency's goals and objectives for this resource; explain why the study methodology recommended by the agency is the most appropriate; document the use of this methodology as a generally accepted practice; and, finally, explain how these studies are related to the agency's resource goals and objectives.

American Rivers, Washington and the U.S. Department of Commerce (Commerce) allege that these requirements shift the burden of proof from the proponents of a project to the resource agencies. They argue that the regulations require that the agencies prove that a project will have a negative effect on the environment rather than requiring that the proponents of the project prove that the project will not have a negative effect. They assert that the applicant is obligated to prove to the Commission, through the study, license application and application amendment process, that its application is best adapted to serve the public interest.

Washington and Commerce assert that the requirements of § 16.8(b)(4)(iii)–(vi) are a substantial change from the NOPR. They request that these provisions either be deleted or included in a reissued NOPR to provide interested parties an opportunity to comment on the changes.

Procedures governing the consultation process are a central consideration of this proceeding. Moreover, as the Commission stated in the final rule, these amended provisions were added in response to comments made on the NOPR. Thus, they clearly fall within the scope of the rulemaking. Further, interested persons, including Washington and Commerce, have had an opportunity on rehearing to comment on the changes adopted in the final rule. The Commission determined in the final rule that these provisions would provide potential applicants with a better understanding of agency requests and should reduce the potential for disputes. The Commission believes that these revisions are necessary to focus the details regarding studies early in the consultation process, and thus declines to make the requested changes. Section 16.8(b)(4) requires resource agencies to explain study requests; it does not require that they assume the burden of proving whether or not a project will harm the environment. A resource agency requests that a study be done to determine what impact a project will have. The proponent of a project conducts the requested study for the same reason. It remains for the Commission to weigh the various study results and other factors to determine if a project is in the public interest.

EEI suggests that the regulations be revised to provide that the justification standards that apply to study requests made during the first stage of consultation are also applicable to requests made during the second stage of consultation. We agree. The Commission intended that the required explanation be applied to all study requests made in any stage of consultation. In order to prevent confusion, the regulations are revised herein to provide that paragraphs (iii)–(vi) of § 16.8(b)(4) apply to all study requests.

[16] 54 FR at 23797–88.

[17] In this regard, requests to either decrease the 15 day notice period or to use telephone notification of meetings, on which all parties agree, should be addressed to the Director.

[18] 54 FR at 23769.

4. Dispute Resolution

The final rule provides a mechanism whereby the Director will resolve disputes that arise between potential applicants and resource agencies during the pre-filing consultation process. The Commission declined to allow appeals to the Commission from certain disputes resolved by the Director, or to specify a standard to guide the Director in dispute resolution.

EEI requests reconsideration of these decisions. It suggests that should the Commission decide to establish a standard to guide the Director, the standard should be the "arbitrary and capricious" standard that the Administrative Procedure Act imposes on the Commission.[19] The Commission declines to make the suggested revisions.

The Director's decisions during the consultation process are not final or binding on the merits of the application. They merely define the parameters of the Director's latitude in subsequently rejecting a filed application on grounds that it is incomplete, since he cannot preclude the filing of an application as incomplete if he had previously determined that the missing data are unnecessary for such filing. Both the Director and the Commission retain the right to determine, after the application has been filed, that such data are necessary to proper consideration of the application on its merits. Insertion of an interlocutory appellate process before the application has been prepared and filed could seriously burden and delay the application-preparation process, and would present the Commission with highly technical decisions to be made on a very thin and amorphous record, in the context of a proceeding that has not yet been formally commenced.

The Commission reiterates that it does not believe it is necessary to specify the standard the Director will use in resolving consultation disputes. Clearly, his decisions will be made case-by-case on the basis of whether the requested study is reasonable and necessary to evaluate the impact of the proposal on the resource goals and management objectives of the resource agencies, whether it is a generally accepted practice for potential applicants to use the methodology requested by an agency, and whether the study will provide the Commission with sufficient information to make an informed decision. Final actions on filed applications may be appealed to the Commission.

[19] 5 U.S.C. 551 *et seq.* (1988).

5. Independent Studies

In the proposed regulations, the Commission provided that all applicants must conduct their own studies unless an applicant and a competitor agree to do otherwise. The Commission also proposed that applicants and competitors not be obliged to share results of studies. The Commission reconsidered these provisions in the final rule and determined that they were inconsistent with existing policy because the Commission will not, in fact, reject an application that contains material copied from another application.

National Hydropower argues that §§ 16.8(c)(1) and 16.8(c)(2) of the proposed regulations reflected current Commission policy and should be restored. They assert that a clear policy with respect to this issue is now necessary because, without these regulations, applicants could have their decisions to pursue independent studies challenged by competing applicants who are interested in pursuing joint studies.

The Commission's determination on independent studies was thoroughly discussed in the final rule, [20] and the rehearing requests do not raise any new factors that would cause us to reconsider that determination. The proposed regulations would have been inconsistent with existing Commission policy as set forth in *WV Hydro, Inc. and the City of St. Marys, West Virginia*,[21] which holds that the Commission will not reject an application for containing material duplicated from another application. As discussed in the final rule, the Commission is not requiring potential applicants to provide copies of their studies to potential competitors, and the Commission encourages all applicants to do their own work.

6. Baseline Studies

In the final rule the Commission declined to revise § 16.8(c)(1) to require potential applicants to collect information about, and study the condition of, resources as they existed in the project area prior to construction of the existing project. The Commission concluded that it would be inappropriate to require applicants to engage in the highly speculative exercise of ascertaining the status of resources that existed in an area prior to the construction of a 50-year old project.

American Rivers, Washington, and Commerce, joined by Columbia Commission and Treaty Council, assert that the collection of baseline data is necessary to provide resource agencies with a basis on which to assess project impacts. They claim that the final rule either improperly eliminates collection of baseline information or improperly defines the baseline for assessing project impacts and obligations. They assert that the collection of baseline data that will provide perspective on the project's effects on fish and wildlife agencies to comply with the mandate of EPA section 10(j).

The rehearing requests repeat the arguments made in response to the NOPR, arguing that it is not possible to determine the impact of a project without a study of the area in its "pristine" pre-project state. As the Commission stated in the final rule,[22] when enacting ECPA, Congress specifically rejected the idea that the Commission should ignore existing projects and assess environmental values pursuant to a hypothetical pre-project baseline environment.[23]

Confederated Tribes and Bands of the Yakima Indian Nation v. *FERC* (Yakima),[24] clearly requires the Commission to evaluate resource impacts prior to licensing. Nothing in that decision, however, either requires the Commission to pretend that current projects do not exist or requires applicants to gather information in an attempt to recreate a 50 year old environmental base upon which to make present day development decisions.

The requests for rehearing have not presented any arguments that were not previously considered. For the reasons discussed in the final rule, the Commission declines to revise the rule

[20] 54 FR at 23774.

[21] 45 FERC ¶ 61,220 (1988).

[22] 54 FR at 23775–76.

[23] The Department of Commerce implies that the statement in footnote 149, taken from the ECPA Conference Report, is somehow taken out of context. The entire quote, when read in context, fully supports the Commission's position that ECPA does not require that the Commission "ignore existing projects and assess environmental values pursuant to a hypothetical pre-project baseline environment."

The text of the complete quote from the ECPA Conference Report reads as follows: "In exercising its responsibilities in relicensing, the conferees expect FERC to take into account existing structures and facilities in providing for these nonpower and nondevelopmental values. No one expects FERC to require an applicant to tear down an existing project. But neither does anyone expect "business as usual". Projects licensed years earlier must undergo the scrutiny of today's values as provided in this law and other environmental laws applicable to such projects. If nonpower values cannot be adequately protected, FERC should exercise its authority to restrict or, particularly in the case of original licenses, even deny a license on a waterway." H.R. Rep. No. 934, 99th Cong., 2d Sess. 22 (1986).

[24] 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

to require applicants to routinely conduct baseline studies.

7. Post Licensing Studies

The final rule provides for post-construction monitoring studies that can only be conducted after construction or operation of proposed facilities to refine project operations or modify project facilities.

American Rivers argues that post licensing studies should not be allowed, and asserts that the Commission's reliance on such studies could mean that there had not been a proper assessment of the impacts of a project prior to licensing. It contends that the final rule allows this practice to continue and consequently violates the holding in Yakima, that the Commission resolve fish, wildlife and other resource issues prior to licensing. In particular, American Rivers suggests that the Commission might "run afoul" of Yakima if it fails to follow its own regulations and has not truly assessed the impacts of a project prior to licensing. It advocates a "bright line" rule that would require that all studies that can be done before licensing must be done and only studies that cannot be done at that time be allowed to be completed subsequent to licensing.

Notwithstanding American Rivers' argument, the Commission does comply with its own regulations. The Commission is well aware that Yakima requires it to evaluate resource impacts prior to licensing, and the regulations clearly require that "a potential applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by resource agencies* * *" [25]

The Commission will continue to include license conditions requiring further studies and actions. Such studies enable the Commission to assess the effectiveness of mitigation measures; to fine-tune project facilities and operations; to secure information that cannot be obtained prior to license issuance; or, to address new circumstances that may arise in the future. Such conditions are appropriate as long as they are not used as a substitute for reasoned pre-licensing evaluation of fishery and other issues.

8. Cumulative Impacts

In the final rule, the Commission clearly delineated its policy on comprehensive plans. The Commission revised § 16.8(f)(6) to explain that the comprehensive plans intended to be covered by this provision are those referenced in section 10(a)(2)(A) of the FPA [26] as defined by the Commission's regulations.[27] The Commission also requires that applicants indicate whether any relevant state or federal resource agency has evaluated the consistency of the proposed project with any such plan.

The Commission stated that it will fully consider all relevant water quality issues and will hold evidentiary hearings if material issues of fact are in dispute. Further, during the agency consultation process, agencies can request that applicants supply information related to the project that is needed to assess cumulative environmental impacts. The Commission also stated that cumulative impacts will be examined during the National Environmental Policy Act [28] process when appropriate.

American Rivers asserts that *National Wildlife Federation* v. *FERC*,[29] requires the Commission to evaluate the cumulative environmental impacts of a proposed license and to ensure that applicants conduct studies and collect sufficient information to allow the Commission to evaluate those cumulative impacts. American Rivers contends that, in order to comply with this decision and to provide a sufficient basis for relicensing in accord with a comprehensive plan for each waterway, the regulations should require applicants to develop such studies and information, both as a part of the pre-filing consultations with resource agencies and as a part of new license applications. It argues that the applicant may be in the best position to collect such information. American Rivers is particularly concerned by the statement in the final rule that "a potential applicant would not be responsible for conducting studies to gather data on other projects that may be necessary to assess cumulative environmental impacts of those projects and the potential applicant's project."[30]

The Commission is well aware of its own responsibilities to consider cumulative impacts and comprehensive plans. The Commission believes that these responsibilities can best be met through the processes discussed in the final rule, as summarized above. When several projects are involved, the Commission will evaluate what data are needed with respect to each of the projects to determine their cumulative impacts, and the Commission will coordinate the collection of that data. The Commission encourages licensees to cooperate with the agencies by conducting all studies which may be appropriate.

9. Privileged Treatment of Pre-Filing Submissions

The final rule provides potential applicants with a mechanism to keep study results and technical information about their proposals free from wrongful appropriation in those limited situations where exemption from disclosure is justified under the Freedom of Information Act (FOIA). The Commission's intention is that any privileged treatment afforded to submitted material will expire upon the filing of the application to which it pertains. All requests for privileged treatment will be handled in accordance with § 388.112 of the Commission's regulations, which does not guarantee non-disclosure.[31]

National Hydropower is concerned that the final rule provides for public participation in the initial joint meeting and imposes no obligations on the agencies to treat applicants' plans as privileged.

The Commission responded to this concern in both the NOPR and the final rule. Non-disclosure provisions apply only to information released by the Commission. The Commission encourages resource agencies to consider the Commission's determination that certain pre-filing consultation information may be exempt from disclosure, but notes that other Federal and state agencies have their own regulations and procedures governing the release of information.[32]

10. Public Participation

The final rule provided that members of the public may attend and participate in the § 16.8(b)(2) initial joint meeting with resource agencies.

American Rivers is concerned that the public is being excluded from participation in the second stage of consultation, which it claims is a critical point at which the agencies and the applicant meet to attempt to reach agreement on the applicant's plans. Because of this exclusion, it argues, the public will not be able to comment on the results of the consultation until the application has been filed with the Commission.

[25] *See* 18 CFR 16.18(c)(1) (1988).

[26] 16 U.S.C. 803(a)(2)(A) (1988).

[27] *See* 18 CFR 2.19 (1988).

[28] National Environmental Policy Act of 1969, 42 U.S.C. 4321–4370(a) (1982).

[29] 801 F.2d 1505 (9th Cir. 1986).

[30] 54 FR at 23778.

[31] *See* 18 CFR 388.112 (1988).

[32] Changes have been made in § 16.8(g) to conform this section with § 388.112 of the Commission's regulations dealing with requests for privileged treatment of documents submitted to the Commission.

Commerce is concerned that the procedures have been limited in order to serve the purposes of the applicant and to downplay the significance of the pre-licensing proceedings. Trout Unlimited asserts that groups similar to Trout Unlimited are composed of individuals with considerable experience and expertise who can make significant contributions to the relicensing process. It requests that the regulations provide for representatives of such groups to participate formally as equals with state agencies, and asserts that this would provide the major benefit of allowing agreements to be reached on a local level. Trout Unlimited argues that statements that the state agencies are the proper representatives of the public are unacceptable, since if such agencies were totally efficient in representing the public interest there would be no groups like Trout Unlimited.

In general, American Rivers, Commerce, and Washington, joined by Treaty Council and Columbia Commission, argue that, contrary to the final rule, an administrative proceeding clearly commences with the filing of a notice of intent. They assert that the fact that ECPA requires that the notice of intent be filed five years before the expiration of the original license and that the project records be open at the same time demonstrates that Congress sought to ensure that the Commission would begin proceedings on the project. They claim that the final rule establishes a scheme which indicates the existence of a proceeding, citing the expansion of the consultation process [33], the creation of the dispute resolution process [34], and the requirement that certain filings be made in accordance with the Commission's Rules of Practice and Procedure.[35]

Commerce and Washington are concerned that the relicensing process is "front-ended" and that important decisions that affect the outcome of relicensing will be made before an application is filed. They contend that the pre-filing consultation process is similar to the preliminary permit phase for a license application under section 4(f) of the FPA, which is always considered to be a separate administrative proceeding by the Commission and subject to the intervention and other provisions of the Commission's Rules of Practice and Procedure.[36] The Department of Commerce argues that since there is a dispute resolution process and ongoing contact between the applicant and the Commission, there is in fact an administrative proceeding.[37]

In sum, these parties argue on rehearing that a formal proceeding has begun as soon as a notice of intent has been filed under § 16.6, and that all interested public parties must be allowed either to intervene formally in that proceeding or to comment informally, and to participate in meetings and have access to project sites.

We disagree. The formal licensing process, like all other case-specific proceedings before the Commission that are initiated by an applicant, commences with the filing of an application. Prior to that event, no formal proceeding exists as there is no matter before the Commission requiring it to act to grant or deny rights or obligations.

Pre-filing consultation is in no way comparable to a preliminary permit proceeding. The application for a preliminary permit initiates an administrative proceeding which ends when the permit is issued. A preliminary permit provides priority for an application for a license, and a new administrative proceeding is initiated if and when an application for the license is filed.

We reject the argument that the pre-filing consultation requirements adopted in the final rule have somehow transformed the application process so as to accelerate the point at which the proceeding formally commences. The pre-filing consultation process *per se* is not new—it was in the regulations as a predicate requirement for filing applications for both an original license and a relicense.[38] The final rule modified those requirements to the relicensing process, and codified them in a separate place in the regulations. Because the relicensing process has statutorily mandated deadlines, which deadlines are driven by the impending expiration of a license for an extant project, it was necessary to refine the pre-filing consultation process for relicensing by establishing an orderly sequence of interim steps and deadlines. But these are merely refinements designed to adapt the already existing pre-filing consultation process to the peculiar time constraints of relicensing.

Nothing in the FPA or ECPA requires that the Commission provide for formal public participation in the consultation process that precedes a formal license application proceeding. Indeed, FPA section 15 as amended by ECPA contains specific provisions requiring advance notice to the public of an existing licensee's intent to file an application for new license. It also requires that extensive data pertaining to the project be made available to the public at the time of the advance notice. Yet Congress did not accompany these provisions with an expansion of the public's existing right to participate as intervenors in formal license application proceedings.

To the extent that there is a statutory requirement of consultation between the application and particular governmental agencies, that requirements reflects a Congressional recognition that the consultation is pursuant to the governmental responsibilities of these agencies. They are entitled to perform those governmental consultative processes pursuant to their own procedures. In the context of proceedings that have not yet formally commenced, and applications that have not yet been completed or filed, it would be presumptuous at best for this Commission to attempt to impose requirements of third party participation on those agencies in the performance of their statutorily mandated functions.

We also note that applicants who are not licensees are not required to file such notices of intent. Thus, if the ability of the public to become intervenors in a relicense application proceeding were to be triggered by the notice of intent that the existing licensee is required to file, only existing licensee applicants would have to respond to the demands of the public participants while their competitors would not. The Commission does not believe this would be equitable or consistent with the competitive spirit underlying ECPA's amendments to the FPA.

We also firmly reject the argument that the final rule "front loads" the decisional process. The decisions on relicensing are made by the Commission, in its consideration of the application after it has been filed. All interested persons have full opportunity to participate in that decisional process, and that is the only decisional process. Agreements made by the applicant and consulting agencies with respect to what the applicant will put in its application

[33] 18 CFR 16.8(a) *et seq.* (1988).
[34] 18 CFR 16.8(b)(5)(i) (1988).
[35] 18 CFR 16.8(b)(5)(iii) (1988).
[36] 18 CFR part 385 (1988).

[37] Washington and the Department of Commerce assert that Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109 (D.C. Cir. 1989), discussed below, indicates that an administrative proceeding may commence prior to relicensing. A careful reading of Platte River reveals no basis for this assertion.

[38] The consultation requirements are in § 4.38. Prior to adoption of the final rule in this docket, those requirements applied to both original licenses and relicenses.

have no binding effect on the Commission, because the application itself is merely the starting point for the Commission's consideration of the applicant's proposal.

In response to the comments on the NOPR, the Commission adopted a requirement of full public participation in the initial joint meeting, at the commencement of the pre-filing consultation process. This will serve to alert the applicant and the consulting agencies to the public's concerns at the outset of that process.

The Commission's current relicensing process also provides numerous other opportunities for meaningful public participation. Following the acceptance of a new license application, the Commission publishes public notice of the application. The notice contains pertinent details describing the location, design, and mode of operation as well as other facts related to the proposed project that can be used to determine the potential impact the proposed project may have on the environment. The notice also provides enough information for the public to assess whether riparian or other property rights will be affected by the proposed project.

The public is given an opportunity to meaningfully participate in the license proceeding as parties by filing a motion to intervene within the time prescribed in the public notice. Becoming a party in a license proceeding entitles one to receive all filed documents in the proceeding, and also ensures the right to seek an appeal or rehearing of any Commission action that may be perceived by a party to be adverse to its interest. If rehearing is sought and then subsequently denied by the Commission, a party has a right to seek judicial review of the Commission's decision.

In the relicensing context, an existing licensee is required to notify the Commission five years prior to the expiration of its license whether or not it will apply for a new license for the project. Concurrent with this notification, the existing licensee must make extensive information about the project available for public inspection at its business offices.

Upon receipt of the existing licensee's notice of intent, and years before a formal license applicaiton is filed at the Commission, the Commission issues a public notice in the local newspaper that identifies the project and states when and where the project information is available. Any interested person or entity may at this time contact the applicant, and indeed is encouraged to do so in order to find out more about the project. In addition, interested persons or entities are encouraged to approach the state or Federal resource agencies to assist in formulating possible solutions to potential problems.

Furthermore, to make the Commission aware of the issues once an application has been filed, private entities are encouraged to forward to the Commission any written correspondence between them and potential applicants and resource agencies. After the filing of the license application, private entities, to the extent they believe concerns have not been addressed, can file comments or interventions with the Commission articulating their position and explaining why they believe additional studies should be performed or additional issues addressed.[39]

The failure of a resource agency to request the preparation of a certain study does not mean that the study will not be done. Applicants are required by the Commission's regulations governing the content of applications [40] to consider and address all relevant resource issues in their applications. The failure of an agency to request a study regarding a resource will not excuse an applicant from addressing that resource issue, either in its application or in response to a Commission deficiency or additional information letter. Thus, potential applicants will be consulting with various interest groups informally in order to adequately address resource issues of interest to these groups, and the public is encouraged to bring any issues not fully covered to the attention of the Commission.

Finally, relicensing proceedings are no different from original licensing proceedings in terms of Commission consideration of agreements between applicants and resource agencies regarding environmental protection, mitigation, and enhancement measures. In each case, the Commission will review any agreed-upon measures and independently determine, pursuant to the requirements of the FPA, whether such measures are appropriate and in the public interest. The Commission may decline to incorporate the measures into a license if it concludes that they are not appropriate, and may adopt different measues in lieu thereof.

For all of the reasons discussed above, we conclude that a rule requiring formal public participation throughout the prefiling consultation period before an acceptable license application is filed is neither legally required nor an appropriate policy. In the final rule, we adopted a requirement of full public participation at the initial meeting in order to afford the public a meaningful opportunity to learn more about the project and to identify resource concerns at the earliest possible date. For the reasons discussed at length above, we decided not to extend that requirement to all of the pre-filing consultation meetings. We have carefully reconsidered our determination in light of the arguments presented in the requests for rehearing, and conclude that the process we adopted in the final rule is reasonable and strikes an appropriate balance.

11. Indian Tribes

In the final rule, the Commission discussed the recommendations that Indian tribes be given a role in the consultation process that is similar, if not equivalent, to that of the resource agencies.[41]

The Commission declined to require that potential applicants consult with Indian tribes as part of the formal consultation procedures established by the regulations. The Commission concluded that Indian tribes would have sufficient opportunity to make their concerns and views known by being able to participate as members of the public in joint public meetings with resource agencies. The Commission acknowledged that the amendments made by ECPA to the FPA require the Commission to solicit and consider the views and recommendations of Indian tribes but concluded that nothing in ECPA or its legislative history require that Indian tribes be made a part of the consultation process between potential applicants and resource agencies.

The Columbia Commission, Treaty Council, and Commerce request rehearing of the Commission's decision not to include Indian tribes in the formal pre-filing consultation processes.

Columbia Commission argues that the purpose of the revised three-stage consultation process under § 16.8, which is to ensure prompt and responsible consultation resulting in the timely filing of complete applications, will be

[39] The Commission recognizes that in some cases potential applicants and resource agencies may refuse to consider private entities' suggestions regarding studies. However, the Commission believes that the relicensing scheme established by ECPA provides both potential applicants and resource agencies with incentives to adequately address the concerns of private entities during consultation. Therefore, the situations where the concerns of private entities are ignored should be minimal.

[40] *See* 18 C.F.R. 4.41, 4.51, and 4.61 (1988). These provisions are applicable to applications for new license. See 18 CFR 16.9(b)(2) (1988).

[41] 54 FR at 23782–83.

frustrated if applicants are not required to consult with Indian tribes.

Columbia Commission also argues that the FPA, ECPA and the doctrine of tribal sovereignty require that tribes be treated in a manner similar to federal and state agencies. Citing *United States* v. *Wheeler*,[42] and *Worcester v. Georgia*,[43] it asserts that the ECPA requirements that establish the substantive and procedural role of Indian tribes are merely a codification of one of the central principles in the field of Federal Indian law—that the powers exercised by Indian tribes stem from the inherent power of limited sovereignty which has never been extinguished. Columbia Commission asserts that it is well settled that there are three separate sources of sovereignty within the Federal constitutional system: state, federal, and tribal.

Commerce contends that the resource management agencies of federally recognized tribal governments should be included in the definition of "resource agency" in § 16.2(d). It states that many of the Indian tribes in the Pacific Northwest and elsewhere have legally protected and recognized interests in fish and wildlife resources that have been granted through treaties, statutes, executive orders, and reservations of lands and water rights,[44] and that these tribes have established their own management resource agencies that work closely with state agencies and devote substantial efforts to the conservation and effective utilization of these resources.[45] It argues that the omission of procedures that recognize the interests of Indian tribes is inconsistent with section 10(a) of the FPA.

Treaty Council argues that the exclusion of tribal management agencies from the formal consultation process prevents "equal consideration" for fish and wildlife required by ECPA, since without the input from tribal resource management agencies the economic and cultural significance of fishing and hunting to Indian tribes will not be fairly addressed.

On rehearing, we will amend the regulations to include appropriate tribal resource management agencies in the formal consultation process. We do not construe the tribes to be government agencies. However, to the extent that certain tribes have legally established responsibilities for the management of fish resources, we agree that they should participate fully in the pre-filing consultation process.

A definition of "Indian tribe" has been added to make clear what entities are entitled to participate in the pre-filing consultation process. The definition includes all Indian groups that are united under one governing body, inhabit a particular and distinct territory, and are appropriately recognized as Indian tribes by the United States.[46] A nexus test is also included in the definition, so that consulted Indian tribes must have tribal (as distinct from individual or social) rights that are or have been affected by the project. In other words, where a project adversely affects the harvest of anadromous fish or is located within a particular reservation to which an Indian tribe has treaty rights, that tribe would be able to participate in the pre-filing consultation process.[47]

The definition is as follows:

(1) "Indian tribe" means, in reference to a proposal to apply for a license or exemption for a hydropower project, a separate and distinct community or body of people of the same or similar aboriginal race historically inhabiting areas within the United States that:

(i) Is united in a community under one leadership or government constituted by law or long-standing custom;

(ii) Inhabits a particular territory;

(iii) Is recognized by treaty with the United States, by federal statute, or by the U.S. Secretary of the Interior; and

(iv) Whose legal rights as as tribe may be affected by the development and operation of the hydropower project proposed, as where the operation of the project could interfere with the management and harvest of anadromous fish or where the project works would be located within the tribe's reservation.

We reach this determination solely as a matter of policy, and without expressing any opinion on the specific legal status of any tribes. As a practical matter, tribes that have responsibilities for the management of fish resources should participate in the pre-filing consultation process in the same manner as government agencies who have such responsibilities. This will facilitate the pre-filing consultation process. We have revised the final rule accordingly.

Inasmuch as some applicants are well into the pre-filing consultation process, we have also added a transition provision to avoid delay and disruption of that process. Paragraph (j)(6) has been added to § 16.8 to provide that potential applicants who have initiated the consultation process in accord with § 16.8 will have 45 days from the date of issuance of this order to initiate consultation with Indian tribes that meet the criteria of § 16.2(f). Questions regarding the scope of this consultation should be addressed to the Director.

D. Notices of Intent From Competitors

The final rule provides that an application will not be processed until the final amendment deadline except to the extent of determining whether it conforms to the Commission's filing requirement (*i.e.*, the processing stage at which an acceptance letter is sent), unless the applicant indicates in its application that it waives the right to file a final amendment pursuant to section 15(c)(1) of the FPA. Absent such waiver, further processing would commence only after the expiration of the final amendment deadline.

Great Northern proposes that, in response to the public notice that the application has been filed, potential competitors should be required to file a notice of their intent to file a competing application. Great Northern contends that at this time, competitors would be in a position to file such a notice of their intent since they would have to be well into the agency consultation process to comply with the rules and file an application on time. Great Northern then proposes that the Commission would delay processing an application until the time for filing a notice of intent to file a competing application had passed, and if none were filed the Commission would then proceed with the processing. Great Northern contends that this would not be anti-competitive because the competing applicant would not be filing the notice of intent until after the existing licensee had filed an application, and the existing licensee would have to file a complete application to trigger the notice of intent

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[42] 435 U.S. 313, 322–23 (1979).

[43] 31 U.S. (Pet.) 515 (1832).

[44] Certain of the Indian tribes in the Pacific Northwest have important treaty rights with respect to runs of anadromous fish in certain rivers. *See Washington* v. *Washington State Commercial Passenger Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985); *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

[45] *See, e.g.*, Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 834 *et seq.* (1988); Pacific Salmon Treaty Act. 16 U.S.C. 3631 *et seq.* (1988); *U.S.* v. *Oregon*, 666 F. Supp. 1461 (D.Or. 1987).

[46] *See, e.g., Montoya* v. *United States*, 180 U.S. 261 (1901); F. Cohen, Handbook of Indian Law 3–19 (1982 ed.).

[47] This situation would arise where the project impedes on the migration of anadromous fish on a particular river, and the Indian tribe has treaty rights to manage or harvest some of the fish runs on that river. Another example would be where a project works is located within an Indian reservation. However, if a group of Indians objects to the licensing of a hydropower project not located on such a river or within their reservation, and the basis of their objections rests on aesthetic, recreational or other grounds shared by local residents but not rooted in rights of the tribe, the Indian group (even if it were a recognized Indian tribe for other purposes) would not be treated as an Indian tribe for purposes of the project.

requirement. Great Northern proposes this scheme in lieu of the procedure adopted in the final rule, of not processing the application until the deadline for amending it has passed unless the applicant in effect accelerates that deadline by waiving its right to file an amendment.

While Great Northern's proposal is not without some merit, on balance we prefer the process adopted in the final rule. The provision adopted therein was designed to avoid diversion of limited resources into processing applications that might later be amended. Such resources would be more efficiently utilized in processing applications that have reached the final amendment deadline. Absent waiver of the right to file an amended application, Great Northern's proposed mechanism would not solve the problem of potential waste of limited staff resources. In addition, as stated in the final rule,[48] section 4(c) of ECPA provides a potential applicant, other than the licensee, the right to file an application up to two years prior to the license expiration date without a requirement to file a notice of intent.

E. Dismissal of Applications

The final rule provides that if the Commission rejects or dismisses an application pursuant to § 4.32, the application can not be refiled if the filing deadline for a new license has expired. Therefore, if the Director rejects or dismisses an application because it is patently deficient,[49] or because the applicant fails to correct deficiencies [50] or respond to an additional information request [51] in a timely manner, the applicant cannot refile its application if the 24-month filing deadline for the project has passed.

Northern California Agency objects to this provision, contending that it could result in the forfeiture of an existing licensee's project for not having gotten the application "altogether right the first time." Northern California recommends that the Commission keep in mind the considerable complexity of a license application and requests that some mechanism for waiver or exception be provided. In the alternative, it requests that the Commission make the filing requirements for an application "crystal clear" and considerably more detailed than the current regulations.

The Commission has stated that applicants can be certain that no forfeiture will occur if they file applications that are not so devoid of the information required by the Commission's regulations as to be patently deficient, and if they fully respond to requests to correct deficiencies or supply additional information within the time periods specified in the deficiency or additional information letters. Applicants have the right to appeal any rejection or dismissal to the Commission, and such appeals, if granted, would result in the reinstatement of the application with its original filing date. This appellate process serves the same purpose as the waiver mechanism Northern California requests, in that it affords the Commission an opportunity to consider all of the circumstances involved on a case-by-case basis.

F. Waiver of Material Amendment Rule

The final rule provides that the Commission's material amendment rule (§ 4.35) [52] will not apply to applications filed under § 16.9, except that the Commission will reissue public notice pursuant to § 16.9(d)(1).

Long Lake asserts that the waiver of the material amendment rule will allow an applicant to submit an entirely new project after seeing the plans of competitors. The Commission does not anticipate that the limited period of time provided for making a final amendment will allow an applicant to conduct the consultation and studies necessary to substantially change a project. The final amendment will be primarily for the purpose of fine tuning the project. The Commission discussed this issue in the final rule, [53] and Long Lake has not raised any new matters that were not previously considered.

In the interest of consistency with the consultation requirements we have added two new paragraphs, (3)(i) and (3)(ii), with respect to consultation in the event of a material amendment. Section 16.8(3)(i) requires that an applicant consult with the relevant agencies and Indian tribes before a material amendment is filed. Section 16.8(3)(ii) provides that an applicant having any doubt as to whether a particular amendment is subject to this requirement may file a written request for clarification with the Director.

G. Standards and Factors for Relicensing

The final rule provides that when the Commission makes its determination regarding whether a proposal is best suited to serve the public interest, it will consider the factors enumerated in sections 15(a)(2) and 15(a)(3) of the FPA.[54]

Northern California Agency expresses concern that the Commission, in examining an existing licensee's track record, would fail to apply all of the FPA section 15(a) public interest factors to all of the actions of the licensee. In particular, it is concerned with actions taken by a licensee in reliance on FPA section 6 and actions taken by a licensee that could have an anti-competitive effect.

Northern California argues that the Commission should treat as a negative factor in the FPA section 15(a)(3)(B) evaluation, an existing licensee's past assertion of rights under section 6 of the FPA to block a superior use of a nearby project's water supplies. The Commission declines to adopt this suggestion. As the Commission stated:

> An existing licensee should not be penalized for legitimately relying on the section 6 prohibition against unilateral alteration of licenses, to protect its ability to operate its project in the manner allowed and required by the existing license. An existing licensee's reliance on FPA section 6 will not be considered as a negative factor under the section 15(a)(3)(B) evaluation. Thus, while an existing licensee's compliance with specific obligations or responsibilities under its license will be examined under section 15(a)(3), its exercise of legitimate rights provided by the license or the FPA will not.[55]

Northern California Agency asserts that the Commission should subject all applications for relicense to a comparative evaluation on the antitrust provision of section 10(h) of the FPA.[56] Northern California Agency expressed the same comment in response to the NOPR, and the Commission responded to it in the final rule: "the clear intent of Congress was that the Commission not subject applications to comparative evaluation on antitrust matters." [57]

H. Joint Applicants

The final rule specifies that an existing licensee filing an application for new license in conjunction with a new entity will not be considered an existing licensee for the purposes of the

[48] *See* 18 CFR 16.9(b)(1) (1988).
[49] *See* 18 CFR 4.32(e)(2)(i) (1988).
[50] *See* 18 CFR 4.32(e)(1)(iii) (1988).
[51] *See* 18 CFR 4.32(g) (1988).

[52] Under § 4.35 of the Commission's regulations, when amendments to applications that are considered "material" are filed, the filing date of the initial application is deemed to be the date the material amendment is filed for a variety of purposes, including the determination of whether the initial application was timely filed vis-a-vis competition deadlines.
[53] 54 FR at 23787.

[54] Section 15(a)(2) of the FPA, 16 U.S.C. 808(a)(2) (1988); section 15(a)(3) of the FPA, 16 U.S.C. 808(a)(3) (1988).

[55] 54 FR at 23,794.
[56] 16 U.S.C. 803(h) (1988).
[57] 54 FR at 23,792.

insignificant differences provision of section 15 of the FPA.

Niagara Mohawk requests rehearing of this provision. In the alternative, Niagara Mohawk requests that the regulation only be applied prospectively.

Niagara Mohawk argues that there are many advantages to joint ventures between existing licensees and other parties in relicensing proceedings, noting specifically the benefits to the ratepayers of the existing licensee. It also points to the significant design modifications that Niagara Mohawk undertook, as part of a joint venture, in the Mechanicville Project in response to concerns regarding historic preservation expressed by resource agencies. It suggests that the Commission should, in some circumstances, treat joint developers as "existing licensees" for the purpose of relicensing.

Niagara Mohawk presented all of these arguments in its comments on the NOPR, and they were fully considered in the final rule. Niagara Mohawk has not raised any new issues of fact, law or policy that persuade us to alter that determination.

In its request for rehearing, Niagara Mohawk reiterates its previous suggestion [58] that if the Commission adopted the proposed rule it should only be applied prospectively since retroactive application of a rule is foreclosed by the express terms of the Administrative Procedure Act.

The arguments about retroactive rulemaking are inapposite in this situation. In *Georgetown* v. *Bowen*,[59] on which Niagara Mohawk relies, the Secretary of Health and Human Services issued hospital cost limit regulations in 1974, pursuant to a statute enacted in 1972. Then, without any subsequent change in the underlying legislation, in 1981 the Secretary issued amended regulations; in 1983 a court invalidated the amended regulations for lack of proper notice and comment before their issuance; and in 1984 the Secretary reissued the amended regulations, making them retroactive to 1981. Order No. 513, however, adopted regulations that became effective only after their issuance and, much more to the point, the relicensing regulations do not replace or supersede previous regulations. To the contrary, the relicensing regulations implement ECPA, and in that sense constitute regulations of first impression. The enactment of ECPA has made it necessary for the Commission to determine whether joint applicants can qualify as an existing licensee when one of the joint applicants is a new entity. The Commission has now done so. Its determination necessarily applies to all relicense applicants, regardless of when they filed their applications, as long as those applications are currently pending. Congress, in ECPA, did not provide for any "grandfathering" treatment of joint applicants, and it would not be appropriate to do so by regulation. This is not retroactive rulemaking; it is implementation of a new statute. Therefore, Niagara Mohawk's request for rehearing on this issue is denied.

I. Annual Licenses

American Rivers and Northern California Agency request that the Commission modify the final rule to conform with the holding in *Platte River Whooping Crane Critical Habitat Maintenance Trust* v. *FERC* (Platte River),[60] which was issued two days after the final rule in this docket.

In that case, the Trust sought review of an order of the Commission declining its request that the Commission undertake an assessment of the need for wildlife protective conditions in the interim annual licenses under which the projects concerned were currently operating pending completion of relicensing proceedings. The Commission declined either to alter the license or to seek the cooperation of the Districts in arriving at consensual amendments to the annual licenses for both projects, on the ground that there was no substantial evidence on which to determine appropriate mitigative conditions. The court determined that the denial of the Trust's request that the Commission undertake an assessment of the need for wildlife protective conditions in the interim annual licenses was an abuse of discretion, and remanded the case to the Commission to conduct such an assessment.

Northern California and American Rivers request that the Commission revise § 16.18 in light of the court's decision. The Commission is adding a new paragraph (d) to § 16.18 to provide that, when issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.

J. Nonpower Licenses

The final rule requires that applicants for a nonpower license must provide, *inter alia*, identification of the agency authorized and willing to assume regulatory supervision over the project.

American Rivers objects to this provision, contending that the requirement that an agency be willing to assume regulatory supervision over the project is inconsistent with the FPA and the Commission's long standing interpretation of the nonpower licensing process. It contends that this regulation illegally frustrates the efforts of private groups to obtain nonpower licenses that would terminate once the nonpower licensee had arranged for complete removal of the structure.

American Rivers misperceives the purpose of a nonpower license, which is to maintain Commission supervision of a project after power facilities have been removed and while the licensee obtains agreement that a state, municipality, interstate agency, or another Federal agency is authorized and willing to assume regulatory supervision over the remaining lands and facilities covered by the nonpower license.

An entity wishing to remove facilities from a waterway can recommend removal to the Commission as an alternative to relicensing. If the Commission determines that project removal is a reasonable alternative, the Commission will consider this request and balance it against the need for the facility.

K. Minor and Minor Part Licenses Not Subject to Sections 14 and 15 of the Federal Power Act

The final rule provides that the FPA section 7(a) municipal preference does not apply to minor licenses when sections 14 and 15 of the FPA have been waived.

Northern California Agency disagrees with this determination. It contends that it has been long standing Commission policy to give minor licensees the option to waive sections 14 and 15 of the FPA and, when these sections have been waived, a license can only be issued under section 4(e), to which the section 7(a) preference will apply. Northern California Agency made a similar statement in reply comments on the NOPR.

The Commission responded fully to these comments in the final rule, stating that Congress clearly restricted municipal preference under section 7(a) of the FPA to original licenses and made it inapplicable to relicensing proceedings.[61] Northern California

[58] *See* Comments of Niagara Mohawk Power Corporation and Fourth Branch Associates on Hydroelectric Relicensing Regulations Under the Federal Power Act, September 8, 1988, at 12–13.

[59] 821 F.2d 750 (D.C. Cir. 1987), *aff'd*, 109 S.Ct. 468 (1988).

[60] 876 F.2d 109 (D.C. Cir. 1989).

[61] 54 FR at 23800.

Agency has not raised any new issues that were not previously considered in the final rule, and has not persuaded us to alter the determination made therein.

L. Section 18 of the FPA

The Commission has determined that section 18 of the FPA, which confers authority on the Department of the Interior (Interior) and Commerce to prescribe fishways, is applicable to relicensing.[62] EEI [63] alleges that the Commission erred in deciding that section 18 applies to relicensing proceedings and cites to the Congressional Record [64] as providing support for this position.[65]

In the final rule, the Commission stated that it intends to discuss fishways and the procedures by which Commerce and Interior will prescribe fishways in a rulemaking proceeding that it intends to commence on section 10(j) of the FPA. The application of section 18 to the relicensing process was thoroughly discussed in the final rule,[66] which quoted extensively from the 1987 Commission decision in Lynchburg Hydro Associates (Lynchburg).[67]

In Lynchburg, the Commission addressed the scope and mandatory nature of the fishway prescription authority in the context of original licensing proceedings. In discussing the interpretation of section 18, the Commission stated that the starting point for interpreting a statute is the language of the statute itself and, absent a clearly expressed legislative intention to the contrary, that language, if unambiguous, must ordinarily be regarded as conclusive.

Section 18, which is cast in terms of fishway obligations of "licensees," does not distinguish between original and subsequent licenses, and therefore appears on its face to be applicable to relicensing proceedings. Since there is no discussion in the legislative history of whether the authority of section 18 to prescribe fishways either does or does not apply to relicensing proceedings, the Commission's adoption of the facial interpretation of the section as applying to relicensing is appropriate.

EEI also asserts that the final rule is a substantial change from the NOPR, since the NOPR did not indicate that section 18 would be applicable to relicensing. Thus, EEI requests that the Commission vacate the discussion of section 18 in the final rule. EEI's arguments are misplaced. As an administrative agency having statutory responsibilities to implement the FPA, the Commission has ample authority to interpret the statute without providing notice or soliciting legal briefs on it.[68]

M. National Environmental Policy Act Statement

The Commission determined promulgation of the rule does not require the preparation of an environmental impact statement (EIS) because the rule is procedural in nature.

American Rivers, Commerce, and Washington argue that the Commission must prepare an environmental assessment (EA) or an EIS before adopting this rule. They assert that in failing to do so the Commission failed to comply with NEPA.[69] American Rivers asserts that the rule is not merely procedural, but will result in substantive changes in the processing of hydroelectric applications.[70] Commerce asserts that the characterization of this rule as procedural is misleading since it provides new requirements that will impair the collection of information on relicensing and attempts to limit the pre-licensing role of agencies.

This rule revises procedures that govern relicensing of hydroelectric power projects. It does not, as Commerce and Washington assert, impair the collection of information or attempt to limit the pre-licensing role of agencies. It does revise some of the procedures by which information is collected, and provides an orderly procedure for pre-filling consultation. As the Commission stated in the final rule, these regulations do not authorize the construction or operation of any facility; rather, they determine the procedures by which such construction will be considered on a case-by-case basis in future proceedings.[71] Thus, no EIS is required.

For the reasons discussed above, all requests for rehearing that are not specifically granted are denied.

These revisions are effective December 26, 1989.

List of Subjects in 18 CFR Part 16

Electric power.

In consideration of the foregoing, the Commission amends part 16 of chapter I, title 18, Code of Federal Regulations as set forth below.

By the Commission.

Commissioner Tranbandt dissented in part with a separate statement attached.

Linwood A. Watson, Jr.,

Acting Secretary.

PART 16—PROCEDURES RELATING TO TAKEOVER AND RELICENSING OF LICENSED PROJECTS

1. The authority citation for part 16 continues to read as follows:

Authority: Federal Power Act, 16 U.S.C. 791a-825r, as amended by the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495; Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); E.O. 12009, 3 CFR 1978 Comp., p. 142.

2. In § 16.2, a new paragraph (f) is added to read as follows:

§ 16.2 Definitions.

* * * * *

(f) *Indian tribe* means, in reference to a proposal to apply for a license or exemption for a hydropower project, a separate and distinct community or body of people of the same or similar aboriginal race historically inhabiting areas within the United States that:

(1) Is united in a community under one leadership or government constituted by law or long-standing custom;

(2) Inhabits a particular territory;

(3) Is recognized by treaty with the United States, by federal statute, or by the U.S. Secretary of the Interior; and,

(4) Whose legal rights as a tribe may be affected by the development and operation of the hydropower project proposed, as where the operation of the project could interfere with the management and harvest of anadromous

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[62] 16 U.S.C. 811 (1988).

[63] Request for clarification and rehearing of Edison Electric Institute on the Hydroelectric Relicensing Regulations, June 16, 1989, at 5-8.

[64] S. Rep. No. 179, 65th Cong. 2d Sess. (1917); H.R. Rep. No. 715, 65th Cong. 2d Sess. (1918).

[65] EEI cites to a debate in the House of Representatives in 1918 on a bill that was a precursor of the 1920 Water Power Act. While the legislative history cited by EEI deals with "fishways", there is no indication that the speakers considered relicensing. The legislative history of ECPA contains a statement that:

Projects licensed years earlier must undergo the scrutiny of today's values as provided in this law and other environmental laws applicable to such projects.

H.R. Rep. No. 99-934, 99th Cong., 2d Sess. 22 (1986). We are not persuaded that a discussion in 1918, on the subject of a Federal-state conflict over prescription of fishways, is germane to the application of the "scrutiny of today's values * * * to such projects."

[66] 54 FR at 23760-61.

[67] 39 FERC ¶ 61,079 (1987).

[68] The statement in the preamble to the final rule on the application of section 18 of the FPA to the relicensing process was made in response to a question on this issue from Washington. Interior and Commerce also commented on the application of section 18 to relicensing. *See* 54 FR at 23760.

[69] National Environmental Policy Act of 1969, 42 U.S.C. 4321-4370(a) (1982).

[70] American Rivers states that it is particularly disturbed by the Commission's statement implying that compliance with NEPA is unnecessary since the projects affected by this rule have been in existence for decades. The Commission neither stated nor implied that projects that have existed for decades need not comply with NEPA on relicensing.

[71] 54 FR at 23805.

fish or where the project works would be located within the tribe's reservation.

3. In § 16.8, paragraphs (a)(1), (a)(2) are revised, new paragraph (a)(3) is added, paragraphs (b)(1) introductory text, (b)(2), (b)(3), (b)(4) introductory text, (b)(4)(vi), (b)(5)(i), (b)(5)(iv), (b)(6), (c)(1) introductory text, (c)(2), (c)(4) introductory text, (c)(4)(i)(B), (c)(4)(ii), (c)(5), (c)(6) through (c)(8), (c)(9)(i), (c)(9)(ii), (c)(10)(i), (c)(10)(ii), (d)(2) introductory text, (e)(1) through (e)(3), (f) title, (f)(1), (f)(3) introductory text, (f)(3)(ii), (f)(5), (f)(6), (g), (h), and (j)(4)(iii)(D) are revised and a new paragraph (j)(6) is added to read as follows:

§ 16.8 Consultation requirements.

(a) *Requirement to consult.* (1) Before it files an application for a new license, a nonpower license, an exemption from licensing, or, pursuant to § 16.25 or § 16.26, a surrender of a project, a potential applicant must consult with the relevant Federal, state and interstate agencies, including the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Environmental Protection Agency, the Federal agency administering any United States lands utilized or occupied by the project, the appropriate state fish and wildlife agencies, the appropriate state water resource management agencies, the certifying agency under section 401 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1341, and any Indian tribe that may be affected by the project.

(2) The Director of the Office of Hydropower Licensing or the Regional Director responsible for the area in which the project is located will, upon request, provide a list of known appropriate Federal, state, and interstate resource agencies and Indian tribes.

(3)(i) Before it files an amendment that would be considered as material under § 4.35 of this part, to any application subject to this section, an applicant must consult with the resource agencies and Indian tribes listed in paragraph (a)(1) of this section and allow such agencies and tribes at least 60 days to comment on a draft of the proposed amendment and to submit recommendations and conditions to the applicant. The amendment as filed with the Commission must summarize the consultation with the resource agencies and Indian tribes on the proposed amendment and respond to any obligations, recommendations or conditions submitted by the agencies or Indian tribes.

(ii) If an applicant has any doubt as to whether a particular amendment would be subject to the pre-filing consultation requirements of this section, the applicant may file a written request for clarification with the Director, Office of Hydropower Licensing.

(b) *First stage of consultation.* (1) A potential applicant must provide each of the appropriate resource agencies and Indian tribes, listed in paragraph (a)(1) of this section, and the Commission with the following information:

* * * * *

(2) Not earlier than 30 days, but not later than 60 days, from the date of the potential applicant's letter transmitting the information to the agencies and Indian tribes under paragraph (b)(1) of this section, the potential applicant will:

(i) Hold a joint meeting, including an opportunity for a site visit, with all pertinent agencies and Indian tribes to review the information and to discuss the data and studies to be provided by the potential applicant as part of the consultation process; and

(ii) Consult with the resource agencies and Indian tribes on the scheduling of the joint meeting and provide each resource agency, Indian tribe, and the Commission with written notice of the time and place of the joint meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(3) Members of the public are invited to attend the joint meeting held pursuant to paragraph (b)(2)(i) of this section. Members of the public attending the meeting are entitled to participate fully in the meeting and to express their views regarding resource issues that should be addressed in any application for new license that may be filed by the potential applicant. Attendance of the public at any site visit held pursuant to paragraph (b)(2)(i) shall be at the discretion of the potential applicant. The potential applicant must make either audio recordings or written transcripts of the joint meeting, and must upon request promptly provide copies of these recordings or transcripts to the Commission and any resource agency and Indian tribe.

(4) Unless otherwise extended by the Director of the Office of Hydropower Licensing pursuant to paragraph (b)(5) of this section, not later than 60 days after the joint meeting held under paragraph (b)(2) of this section each interested resource agency and Indian tribe must provide a potential applicant with written comments:

* * * * *

(vi) Explaining how the studies and information requested will be useful to the agency or Indian tribe in furthering its resource goals and objectives.

* * * * *

(5)(i) If a potential applicant and a resource agency or Indian tribe disagree as to any matter arising during the first stage of consultation or as to the need to conduct a study or gather information referenced in paragraph (c)(2) of this section, the potential applicant or resource agency or Indian tribe may refer the dispute in writing to the Director of the Office of Hydropower Licensing for resolution.

* * * * *

(iv) The Director of the Office of Hydropower Licensing will resolve disputes by letter provided to the potential applicant and the disagreeing resource agency or Indian tribe.

* * * * *

(6) Unless otherwise extended by the Director of the Office of Hydropower Licensing pursuant to paragraph (b)(5) of this section, the first stage of consultation ends when all participating agencies and Indian tribes provide the written comments required under paragraph (b)(4) of this section or 60 days after the joint meeting under paragraph (b)(2) of this section, whichever occurs first.

(c) *Second stage of consultation.* (1) Unless determined otherwise by the Director of the Office of Hydropower Licensing pursuant to paragraph (b)(5) of this section, a potential applicant must complete all reasonable and necessary studies and obtain all reasonable and necessary information requested by resource agencies and Indian tribes under paragraph (b):

* * * * *

(2) If, after the end of the first stage of consultation as defined in paragraph (b)(6) of this section, a resource agency or Indian tribe requests that the potential applicant conduct a study or gather information not previously identified and specifies the basis for its request, under paragraphs (b)(4)(i)–(vi) of this section, the potential applicant will promptly initiate the study or gather the information, unless the Director of the Office of Hydropower Licensing determines under paragraph (b)(5) of this section either that the study or information is unreasonable or unnecessary or that use of the methodology requested by a resource agency or Indian tribe for conducting the study is not a generally accepted practice.

* * * * *

(4) A potential applicant must provide each resource agency and Indian tribe with:

(i) * * *

(B) Responds to any comments and recommendations made by any resource

agency or Indian tribe either during the first stage of consultation or under paragraph (c)(2) of this section;

(ii) The results of all studies and information gathering either requested by that resource agency or Indian tribe in the first stage of consultation (or under paragraph (c)(2) of this section if available) or which pertains to resources of interest to that resource agency or Indian tribe and which were identified by the potential applicant pursuant to paragraph (b)(1)(vi) of this section, including a discussion of the results and any proposed protection, mitigation, or enhancement measure; and

* * * * *

(5) A resource agency or Indian tribe will have 90 days from the date of the potential applicant's letter transmitting the paragraph (c)(4) of this section information to it to provide written comments on the information submitted by a potential applicant under paragraph (c)(4) of this section.

(6) If the written comments provided under paragraph (c)(5) of this section indicate that a resource agency or Indian tribe has a substantive disagreement with a potential applicant's conclusions regarding resource impacts or its proposed protection, mitigation, or enhancement measures, the potential applicant will:

(i) Hold at least one joint meeting with the disagreeing resource agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility not later than 60 days from the date of the disagreeing agency's or Indian tribe's written comments to discuss and to attempt to reach agreement on its plan for environmental protection, mitigation, or enhancement measures; and

(ii) Consult with the disagreeing agency or Indian tribe and other agencies with similar or related areas of interest, expertise, or responsibility on the scheduling of the joint meeting and provide the disagreeing resource agency or Indian tribe, other agencies with similar or related areas of interest, expertise, or responsibility, and the Commission with written notice of the time and place of each meeting and a written agenda of the issues to be discussed at the meeting at least 15 days in advance.

(7) The potential applicant and any disagreeing resource agency or Indian tribe may conclude a joint meeting with a document embodying any agreement among them regarding environmental protection, mitigation, or enhancement measures and any issues that are unresolved.

(8) The potential applicant must describe all disagreements with a resource agency or Indian tribe on technical or environmental protection, mitigation, or enhancement measures in its application, including an explanation of the basis for the applicant's disagreement with the resource agency or Indian tribe, and must include in its application any document developed pursuant to paragraph (c)(7) of this section.

(9) * * *

(i) It has complied with paragraph (c)(4) of this section and no resource agency or Indian tribe has responded with substantive disagreements by the deadline specified in paragraph (c)(5) of this section; or

(ii) It has complied with paragraph (c)(6) of this section if any resource agency or Indian tribe has responded with substantive disagreements.

(10) * * *

(i) Ninety days after the submittal of information pursuant to paragraph (c)(4) of this section in cases where no resource agency or Indian tribe has responded with substantive disagreements; or

(ii) At the conclusion of the last joint meeting held pursuant to paragraph (c)(6) of this section in cases where a resource agency or Indian tribe has responded with substantive disagreements.

(d) * * *

(2) When an applicant files such application documents with the Commission, or promptly after receipt in the case of documents described in paragraph (d)(2)(iii) of this section, it must serve on every resource agency or Indian tribe consulted, and, in the case of applications for surrender or nonpower license, any state, municipal, interstate, or Federal agency which is authorized to assume regulatory supervision over the land, waterways, and facilities covered by the application for surrender or nonpower license, a copy of:

* * * * *

(e) *Resource agency or Indian tribe waiver of compliance with consultation requirement.* (1) If a resource agency or Indian tribe waives in writing compliance with any requirement of this section, a potential applicant does not have to comply with that requirement as to that agency or Indian tribe.

(2) If a resource agency or Indian tribe fails to timely comply with a provision regarding a requirement of this section, a potential applicant may proceed to the next sequential requirement of this section without waiting for the resource agency or Indian tribe to comply.

(3) The failure of a resource agency or Indian tribe to timely comply with a provision regarding a requirement of this section does not preclude its participation in subsequent stages of the consultation process.

(f) *Application requirements documenting consultation and any disagreements with resource agencies or Indian tribes.*

* * * * *

(1) Any resource agency's or Indian tribe's letters containing comments, recommendations, and proposed terms and conditions;

* * * * *

(3) Notice of any remaining disagreement with a resource agency or Indian tribe on:

* * * * *

(ii) Information on any environmental protection, mitigation, or enhancement measure, including the basis for the applicant's disagreement with the resource agency or Indian tribe.

* * * * *

(5) Evidence of all attempts to consult with a resource agency or Indian tribe, copies of related documents showing the attempts, and documents showing the conclusion of the second stage of consultation;

(6) An explanation of how and why the project would, would not, or should not, comply with any relevant comprehensive plan as defined in § 2.19 of this chapter and a description of any relevant resource agency or Indian tribe determination regarding the consistency of the project with any such comprehensive plan;

* * * * *

(g) *Requests for privileged treatment of pre-filing submission.* If a potential applicant requests privileged treatment of any information submitted to the Commission during pre-filing consultation (except for the information specified in paragraph (b)(1) of this section), the Commission will treat the request in accordance with the provisions in § 388.112 of this chapter until the date the application is filed with the Commission.

(h) *Other meetings.* Prior to holding a meeting with a resource agency or Indian tribe, other than a joint meeting pursuant to paragraph (b)(2)(i) or (c)(6)(i) of this section, a potential applicant must provide the Commission and each resource agency or Indian tribe (with an area of interest, expertise, or responsibility similar or related to that of the resource agency or Indian tribe with which the potential applicant is to meet) with written notice of the time and place of each meeting and a

written agenda of the issues to be discussed at the meeting at least 15 days in advance.

* * * * *

(j) *Transition provisions.*

* * * * *

(4) * * *

(iii) * * *

(D) A potential applicant must upon request promptly provide to the Commission and any resource agency or Indian tribe copies of the audio recordings or written transcripts of the sessions of the public meeting.

* * * * *

(6) A potential applicant that has initiated consultation with resource agencies in accord with this section must initiate consultation with Indian tribes meeting the criteria set forth in § 16.2(f) not later than February 9, 1990.

4. In § 16.18, a new paragraph (d) is added to read as follows:

§ 16.18 Annual licenses for projects subject to sections 14 and 15 of the Federal Power Act.

* * * * *

(d) In issuing an annual license, the Commission may incorporate additional or revised interim conditions if necessary and practical to limit adverse impacts on the environment.

Trabandt, Commissioner, Dissenting in Part.

The majority has affirmed its earlier determination that section 18 of the Federal Power Act, which confers authority on the Departments of Interior and Commerce to prescribe fishways, is applicable to relicensing. I disagreed with the majority's determination at the time of issuance of the Final Rule and still believe that section 18 is *not* applicable with respect to the relicensing of existing projects. My belief is based on several legal and policy grounds.

Legal

First, I place considerable significance from a statutory construction perspective on the decision of Congress to enact the section 15 process in ECPA. I find it inexplicable that Congress would have enacted section 15 which includes the elaborate section 10(j) requirements with regard to the subject of fish and wildlife recommendations, if there was any conceivable argument that section should apply to relicensing. In the alternative, if section 18 was deemed to apply to relicensing, Congress surely would have noted that and rationalized its application as part of section 15.

Second, the decision unnecessarily jeopardizes two important Congressional interests in Commission relicense proceedings: to protect the interests of the investors and the project's customers. I discussed this point in detail in my dissenting opinion in *City of Pasadena Water and Power Department*, 46 FERC ¶61,004 (1989).

Third, there is no compelling evidence in the statute itself or its legislative history that suggests section 18 authority applies to relicensing proceedings. Indeed, the Edison Electric Institute (EEI) in its rehearing petition on this issue, supplies citations to legislative history that confirms my belief that the authority of the Secretary under section 18 could only be exercised prior to the initial licensing of an unconstructed project. In response to a question seeking an answer on the perceived federal-state conflict embodied in section 18, one of the bill's managers, Mr. Esch, offered a statement that provides ample support for this proposition:

Mr. Esch. Now, if we gave that power to the Secretary of Commerce—and there is no other Federal official to whom it could be given—*to be exercised at the time the dam is constructed*, when it could be installed more cheaply than it could be at any time thereafter, we would avoid the delay that would necessarily result if we left it for the State officials to authorize, and in many cases it would not be authorized by the State officials, and in some States they have no laws covering the subject matter. I do not think that if the Secretary of commerce exercised his power he would do it in contravention of or without some conference with the State authorities, and I think all could be amicably arranged. I do not anticipate any of the dangers or difficulties such as the gentleman from Massachusetts seems to suggest by his interrogatory.

Mr. Walsh. We may not always have an amiable and efficient Secretary of Commerce. Suppose we had one that gets into conflicts with the State authorities over this fishway business? Which regulation is going to predominate? The Federal one prescribed by the Secretary of Commerce or the one prescribed by the State authority?

Mr. Esch. I feel where the Government gives to a licensee the right to construct a dam over a navigable water, it can affix such conditions as it seem best, and among those conditions would be one to give the Secretary of commerce *the right to say that a fishway should be put in a dam at the time of construction*. So on that theory I believe we could justify the provisions of the bill, the putting in of the fishway being one of the conditions which the Government exacts for the issuance of the grant.

Cong. Rec. 10036 (House) September 5, 1918; emphasis added. This legislative history clearly indicates that Congress intended the Secretary to have an opportunity to prescribe fishways "at the time of construction" of a project.

Policy

The following policy considerations support what I believe to be the more sensible legal interpretation of section 18 with respect to its applicability to relicensing proceedings.

First, the design and installation of fishways at hydroelectric projects is, generally, very costly in terms of construction, operation and maintenance costs, and potential negative impact on project operations and power generation.

Second, a potential licensee should be given the opportunity to include in any economic feasibility assessment to a reasonable estimate of expected future expenses. It is unreasonable to issue a license to an applicant and not at least put the licensee on notice that signficant expenses are yet to come. A recent Commission case serves to highlight the potential financial danger associated with planning development of a hydropower project, even when the project wil be located at an existing dam site.

In *Eugene Water and Electric Board*, 49 FERC ¶ 61,211 (1989), the Commission issued an original license to an applicant for a proposed project that will use surplus water or water power from a government dam, owned and operated by the U.S. Army Corps of Engineers. However, there currently is some doubt as to whether the licensee will develop the project because of conditions in the license relating to construction of fishway facilities prescribed by the National Marine and Fisheries Service (NMFS), the agency within Commerce responsible for recommending construction of fishway facilities pursuant to section 18 of the EPA. In accordance with the NMFS' recommendation, Commerce submitted a fishway prescription pursuant to section 18 that contained criteria for a specific fish screen much more comprehensive than ever before submitted by Commerce under section 18. The manner in which this fish screen is to be constructed was not previously addressed in the lengthy consultation process prior to licensing this project, nor was it addressed at the section 10(j) meeting held pursuant to the recent amendments of the Electric Consumer Protection Act of 1986 (ECPA). Parenthetically, ECPA included this procedure for the purpose of resolving fish and wildlife controversies that arise during consultation with the agencies.

The new information on the specific fishway structure required by NMFS in *Eugene*, indicated that the construction of the fishway facilities would prove to be very costly. Commerce provided no substantial evidence that the facilities prescribed could be constructed at the site of the project, would be effective, or were needed; nor did Commerce provide any drawings or cost estimates. Indeed, in my concurring opinion to *Eugene*, I pointed out how NMFS recommending construction of fishway facilities pursuant to section 18, was apparently using section 18 authority to kill the project. In essence, NMFS was using section 18 authority to veto a project that the Commission unanimously agreed is a responsible effort to develop needed electric generation in the northwestern region of the United States. The tragic irony is that they may yet be successful.

Nevertheless, because section 18 is mandatory, the Commission felt compelled to require the licensee to construct, operate, and maintain the fishways that Commerce prescribed. However, the Commission reserved the right to modify, if necessary to preserve the economics of the project, the design of the fishway facilities. Even with this reservation however, the licensee may still decide that the project, made marginally economic by the construction of the facilities, is not worth developing. At least in this original license instance, the licensee can

make that business decision before having expended large sums of money for the development of the project. In a relicensing proceeding, that option will not exist.

Third, with respect to relicense applications that propose to do nothing more than continue the existing operation without any modifications, it appears to me to be grossly inappropriate to permit Interior or Commerce to require the design, construction, operation, and maintenance of costly fish passage facilities without requiring Interior or Commerce to meet at least some threshold standard of extraordinary circumstances. I am particularly concerned that current Federal budgetary constraints that limit funding for fishery facilities will precipitate the use of the section 18 authority to require such facilities as a condition of a new license for existing hydroelectric projects, in the absence of such a standard. In my judgement, this Commission has the responsibility for ensuring a proper balance of the need for continued economic operation of existing hydroelectric projects that are subject to relicensing and any asserted need for new fishway facilities at an operating project.

Section 18 Implementation

Apart from the question of whether section 18 should apply in the relicensing process, which the majority here has decided in the affirmative, there is the important implementation question of how section 18 will be applied in the context of this Final Rule. In that regard, I would like to highlight and reiterate the most recent statement of the Commission on that general question as it was addressed in the aforementioned *Eugene* case. To that end, I will quote from my separate opinion in that case of the section 18 issue.

The Commission unanimously agreed that the Blue River Dam project is a responsible effort to develop needed electric generation in the Northwestern region of the United States and, in so doing, repelled an aggressive attempt by the National Marine and Fisheries Service (NMFS) to impose unjustifiable costs for *inter alia*, water temperature controls that would have rendered the project uneconomical. The Commission also rejected concerted efforts by NMFS to abuse its procedural and substantive prerogatives under section 10 and section 18 of the Federal Power Act to cripple or kill this project, as described at length at pages 3 to 13 of the slip opinion.

As this case demonstrates, the section 10(j) and section 18 statutory scheme has been used by NMFS to play a high takes poker game of sorts. By its actions here, NMFS has laid its cards on the table, so to speak, in that game. It has finally demonstrated beyond any reasonable doubt that it believes it holds a "wild card" to dictate the results of the game, including a high handed effort here to cripple or kill a project that rates as high for nondevelopment resources as it does for hydroelectric power potential. In fact, as the Commission states in footnote 15, at page 11, for NMFS to "assert a section 10(j) inconsistency at the last moment is to try to veto the project based on procedural gamesmanship." As a result, it is necessary and appropriate, in my judgment, to write separately for the purpose of calling a spade a spade, as it were.

In this regard, I think it is worth noting the section 18 issued contained in this proceeding. Section 18, cannot and must not be read in complete isolation, as a free standing statutory provision, as if the rest of the Federal Power Act, particularly as it was amended by the Electric Consumer Protection Act (ECPA), does not exist. It would be completely inconsistent with the thrust of the Federal Power Act, particularly after ECPA, to argue that NMFS under section 18 has carte blanche to do indirectly through section 18 that which it cannot do directly through section 10(j). I do not believe that Congress, at any point before or after ECPA, ever intended that the scope of section 18 was such that NMFS could impose requirements under section 18 that would alter materially the project design and operation, over which the Commission otherwise has exclusive jurisdiction, for any and every project on any waterway in the country. That would include any future effort by NMFS in this case to use the prescription under section 18 to kill this hydroelectric development at an existing impoundment which clearly will enhance nondevelopment resources, in addition to providing needed electric power in a region of the nation which is experiencing a rapidly diminishing supply of electricity. That also would include any effort by NMFS, in the context of prescribing a fishway as an integral part of the broader project, to become an independent authority able to dictate the economic viability of the project or to exercise wholly separate and independent control over design, construction, and operation of the project.

Accordingly, as the Commission has made clear previously in *Lynchburg Hydro Associates*, 39 FERC ¶ 61,079 (1987) (*Lynchburg*) the Commission by necessity must determine independently whether the fishway prescribed by NMFS exceeds the narrow scope of section 18 and would require any significant or material modification to the project design, construction or operation under the license as otherwise developed pursuant to the FPA, as amended by ECPA. That independent responsibility clearly vested in the Commission includes the authority to determine whether the prescribed fishway would, as prescribed by NMFS, be so unreasonably costly as to render the project uneconomic. A "Cadillac" fishway design prescribed by NMFS, which would render the project uneconomic, when a "Chevrolet" alternative design would be adequate, would be no more reasonable than a prescribed design which would materially alter the general design, construction, or operation of the licensed project. As surely as day must follow night, if a prescribed fishway design would kill a project through excessive costs not reasonably necessary, that prescribed design would constitute a material alteration to the construction and operation of the licensed project. This is so, because there would be no construction or operation in the end, and simple logic dictates that such a result certainly is not immaterial nor inconsequential. Thus, it is quite clear that the scope of section 18 cannot include discretion on the part of NMFS to prescribe a design with excessive and unreasonable costs that threaten project viability.

The Commission in an analogous way in this case has recognized that the adoption of the NMFS proposal for installation by the Eugene Water and Electric Board of water temperature control facilities is unjustified here. The Commission concludes, slip opinion at 10, that "installation of appropriate water control facilities to mitigate water temperature impacts is properly the responsibility of the Corps [of Engineers] rather than of the applicant [and] [t]his is especially true in this case, where to require the licensee to install temperature control facilities would remove the net benefits of the project." Thus, the Commission already has rejected one NMFS proposal that beyond any reasonable doubt would render the project a dead letter. Similarly, as to the NMFS fishway facility design criteria, I am satisfied that the Commission has an equally affirmative obligation to ensure that those criteria do not affect negatively the net benefits of the project in terms of its cost or design, construction and operation. Thus, the NMFS design criteria can provide general engineering and technical guidance but only to the extent that application of the guidance would not render the project uneconomic, particularly where a less costly alternative would be adequate.

Similarly, and just as obvious, NMFS has no authority to prescribe rigid and excessive design criteria for fishways which are incompatible with the general project design and subsequent construction and operation already approved in this license. It must be remembered, for example, that the Commission must have the ultimate responsibility for dam safety engineering considerations, as well as impacts on other affected resources, such as flood control, irrigation and recreation, in addition to the fishery resources for which the fishway design criteria ostensibly would be prescribed. Thus, the NMFS prescribed fishway design cannot be allowed to negatively impact on dam safety, navigation, flood control, irrigation, water supply, or recreation.

The Commission on page 12 of the slip opinion expressly cites two cases, *Lynchburg* and *Clearwater Hydro Limited Partnership*, 41 FERC ¶ 61,330 (1987) (*Clearwater*), where it has discussed how it will address the scope of section 18. Indeed, both the *Lynchburg* and *Clearwater* cases cited on that page clearly stand for the principle that the authority to "prescribe" fishways does not include broad power to impose mandatory conditions of license unrelated to fishways and cannot be used as a vehicle for requiring substantial revisions to the project's design or operation, since such matters are entrusted to the Commission's ultimate judgment. That principle is crucial here, because, as discussed at page 12, NMFS has not provided substantial evidence that the Green Peter fish facilities could even be constructed at the Blue River Reservoir, would be effective, or for that matter even are needed; nor has NMFS provided any drawings or cost estimates. In that regard, the instant order (1) affirms that crucial principle, (2) states, at

page 12 of the slip opinion, that the Commission retains final authority over project structures, and (3) reserves the right in Article 411 of the license for the Commission to require modifications to the functional design drawings, if such modification proves necessary as a consequence of NMFS' design criteria as provided in its October 6, 1989 letter cited in the Article. As a result, I support this order with the clear understanding and expectation that the principle established in *Lynchburg* and *Clearwater* will be applied to the NMFS fishway design criteria and the resulting functional design drawings of the licensee.

In conclusion, for this Commissioner, the NMFS cards on the table in this case are as clear and unambiguous as clubs, diamonds, hearts, and spades and, when it is all said and done in this case, the Commission must not accede to the NMFS efforts to cripple or kill this project. Consequently, I urge my colleagues and the Commission staff to remain diligent in our efforts to preserve the significant net benefits of the project in the face of any further attack on the project by NMFS under the rubric of section 18. I also want to assure more generally all those still committed to a hydroelectric option for this nation that I am confident of continued vigilance in these efforts in future cases.

I would make a few further observations about the application of section 18 in the relicensing process established by this Final Rule. First, Interior or Commerce under § 18 authority must not be allowed to delay the critical relicensing schedule established by the Final Rule to meet the statutory deadlines enacted by Congress in section 15 of the ECPA. That relicensing schedule has carefully balanced many competing factors to ensure that the licensee, other applicants, all state and Federal agencies, all interested parties and the public at large have a full opportunity to participate in the relicensing process in a timely way that will support decisions by the Commission in conformance with the deadlines and other applicable provisions of ECPA.

Second, any Interior or Commerce requirements for fishways must be provided to the Commission in a timely fashion in order that those requirements can be incorporated into the relicensing process and considered appropriately by the Commission, the licensee, other applicants, other agencies and all interested parties. If Interior or Commerce were to fail to do that, it would be well nigh impossible for the Commission to conduct the comparative analysis and evaluation of competing applications mandated by ECPA, because a critical factor with regard to fishery resources, project costs, minimum flows and other aspects of the project simply could not be calculated, analyzed, or evaluated on either a single application or comparative basis, as ECPA requires.

Third, the existing hydroelectric projects subject to relicensing are, after all, *operating* projects providing an important, and in some cases, critical source of electrical power for their regional electric grids. Therefore, the admonitions of the Commission in the *Eugene* case as to the limitations on the scope of the authority under section 18 in original licensing for new projects must, of necessity, be read to encompass this very significant additional dimension in the context of relicensing existing projects.

Interior or Commerce should not and, indeed, must not be allowed to impose new fishway construction and operating requirements which will materially interrupt the operation of the existing projects, disrupt the scheduling of electric power generation, or degrade the rated amount of electric power generation capacity. Such material interruption, disruption or degradation would affect negatively the critical availability of this important existing source of electric power for regional electric consumers at a time in the 1990's of growing demand and heightened concern about the availability of adequate supply in the form of generation capacity, particularly the clean, domestic, reliable, renewable and cost-effective electric generation from these existing hydroelectric projects which in the aggregate constitute a significant percentage of the nation's current supply. That concern would be particularly important in the Pacific Northwest region of the country where existing hydroelectric projects subject to relicensing constitute a major source of regional electric power.

Fourth, pursuant to ECPA, the Commission must carefully consider all non-power resources relevant to a particular existing project in the relicensing process, including but not limited to the fishery resource, on an "equal consideration" basis, although not necessarily on an "equal treatment" basis. Therefore, the provision for new fishway facilities under section 18 must be encompassed by the Commission within its overall assessment of all power and non-power resources as part of its "equal consideration" responsibilities. Consequently, Interior or Commerce should avoid requiring new fishway facilities which are not in harmony with the overall balancing of competing power and non-power resource interests which the Commission must make pursuant to ECPA. In the end, while there may be competing applications and a variety of fishery resource recommendations from various agencies and parties, there is only one existing and currently operating project for which all requirements must be harmonized for safety, technical and operational purposes, as well as to provide the lowest reasonable cost and most reliable operation of the electricity generation for regional electric consumers. That can only occur in the form of such a harmonized technical and operational approach of all applicable requirements for new fishway facilities or modifications of existing facilities.

Fifth, any Interior or Commerce requirement for fishways should be formulated in the context of current operations of an existing project, rather than some form of past historical postulation of the pre-existing fishery resource decades ago, prior to the original construction and operation of the existing project. In the Final Rule, the Commission has rejected recommendations calling for required so-called "base-line" data of the pre-existing fishery resource before construction of the project. For the same reasons, Commerce or Interior under section 18 must not require fishways that do not reflect current fishery resources and related efforts today for protection, mitigation and enhancement of those current resources.

I hope these observations are helpful for the commission staff, Commerce and Interior, licensees, other applicants, state and Federal resource agencies and other interested parties in their efforts to integrate the section 18 implementation responsibly into the relicensing process established in this Final Rule.

Conclusion

I dissent on the majority's decision in the Final Rule to require the application of section 18 to the relicensing of existing projects for the aforementioned legal and policy reasons. In the end, I would hope that decision will be reversed and section 18 thereafter would only be applied to original licensing. In the interim, however, the practical reality is that section 18 must apply to relicensing under the Final Rule. Consequently, I believe that the Commission, Interior and Commerce must proceed in good faith to implement that new requirement in a manner which is wholly consistent with the letter and spirit of ECPA, which is the most recent direct expression of Congressional intent for the relicensing process. I look forward to that effort in the months ahead under the Final Rule.

For these reasons, I dissent.

Charles A. Trabandt,

Commissioner.

[FR Doc. 89-30364 Filed 12-29-89; 8:45 am]

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18 CFR Part 270

Establishment of Deadlines for First Sellers To Make and Report Refunds; Order on Rehearing

[Docket No. RM89-6-001; Order No. 515-A]

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

Issued December 15, 1989.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule, order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) issued a final rule in Order No. 515 to revise its regulations for carrying out wellhead pricing refund requirements under the Natural Gas Policy Act of 1978. The final rule revised §§ 270.101 and 271.805 of the Commission's regulations to establish specific time limits by which first sellers must make refunds of overcollections or unauthorized collections and file refund reports with the Commission.

This order on rehearing denies in part and grants in part renearing of Order No. 515. This order also amends the